

## **Example Language for IC on Closed Air Force Bases in California From Norton AFB Basewide ROD dated September 2005**

### **2.3.4.2 Institutional Controls**

ICs are non-engineering, non-technical mechanisms used to reduce or prevent human exposure to contaminants. ICs are being applied to four former Norton AFB sites: IRP Sites 2, 5, and 19 and the SAR. Figure 2-3 shows the locations of these sites and summarizes the ICs for each. AOC 4 is an NFA site. However, it is shown on the figure because DTSC may pursue a SLUC. Specific language is included in this ROD regarding implementation, monitoring, reporting, and enforcement of the selected ICs. Therefore, compliance with the terms of this ROD will be protective of human health and the environment. Because the restrictions are specifically described in Section 2.5 and the means for implementing the restrictions are detailed herein, it is not necessary for the Air Force to submit any new post-ROD, IC implementation documents, such as a Land Use Control Implementation Plan (LUCIP), new operation and maintenance (O&M) plans or RA work plans. The IC alternatives include various enforceable use restrictions and land use controls on the use of the property. The Air Force is ultimately responsible for implementing, maintaining, and monitoring the remedial actions (including ICs) before and after property transfer. The Air Force will exercise this responsibility in accordance with CERCLA and the NCP. Meeting RAOs shall be the primary and fundamental indicator of IC performance, the ultimate aim of which is to protect human health and the environment. Performance measures for ICs are the RAOs plus the actions necessary to achieve those objectives. It is anticipated that successful implementation, operation, maintenance, and completion of these measures will achieve protection of human health and the environment and compliance with all legal requirements.

The Air Force may contractually arrange for third parties to perform any and all of the actions associated with ICs, although the Air Force is ultimately responsible under CERCLA for the successful implementation of the ICs, including monitoring, maintenance, and review of ICs. Maintenance, monitoring, and other controls as established in accordance with this ROD and the appropriate transfer documents will be continued until the ICs are no longer necessary as specified within the description of alternatives for affected sites in the Basewide OU or they are modified due to reduction in toxicity or potential exposure to contamination. Land use controls shall be maintained until the concentration of hazardous substances in the soil and groundwater are at such levels as to allow for unrestricted use and exposure.

### **Deed Restriction and Reservation of Access**

The federal deed(s) containing IRP Sites 2, 5, and 19 and the SAR will include a description of the residual contamination on the property, consistent with the Air Force's obligations under CERCLA Section 120(h) and the specific restriction set forth in Section 2.5 for each site under "Description of Selected Remedy." The IC, in the form of a deed restriction, is an "environmental restriction" under California Civil Code Section 1471.

The deed(s) will contain appropriate provisions to ensure that the restrictions continue to run with the land, as provided in California Civil Code Section 1471, and will include a legal description for each site (IRP Sites 2, 5, and 19 and the SAR). The Air Force and regulatory agencies may conduct inspections of the ICs at Sites 2, 5, and 19 and the SAR. The deed(s) will also contain a reservation of access to the property for the Air Force, U.S. EPA, and DTSC, and their respective officials, agents, employees, contractors, and subcontractors for purposes consistent with the Air Force IRP or the FFA (and the Air Force will provide such access to regulatory agencies prior to transfer). The environmental restriction is the basis for part of the CERCLA 120(h)(3) covenant that the United States is required to include in the deed for any property that has had hazardous substances stored for 1 year or more or known to have been released or disposed of on the property. During the time between adoption of this ROD and deeding the property, appropriate restrictions are implemented at IRP Sites 2, 5, and 19 and the SAR by the lease between the Air Force and the IVDA or SBIAA.

### **Notice of Institutional Controls**

The Air Force will include the specific deed restriction language set forth in this ROD in the deed(s) for the parcels that include IRP Sites 2, 5, and 19 and the SAR and will provide a copy of the deed to the regulatory agencies as soon as practicable after transfer of fee title. The Air Force will provide information to the property owners regarding the necessary ICs in the draft deed(s). The signed deed(s) will also include the specific land use restriction(s) as well as a condition that the transferee execute and record an SLUC, within 10 days of transfer, to address any state obligations pursuant to State law, including 22 CCR, Section 67391.1. The Air Force will ensure that the transferee has met this condition. The information will also be communicated to appropriate state and local agencies with authority regarding any of the activities or entities addressed in the controls to ensure that such agencies can factor the information into their oversight, approval, and decision-making activities. Prior to conveyance of IRP Sites 2, 5, and 19 and the SAR, U.S. EPA and DTSC representatives will be given reasonable opportunity to review and comment on the applicable deed language described in this section and associated rights of entry for DTSC and U.S. EPA for purposes of IC oversight and enforcement.

### **Annual Evaluations/Monitoring**

Prior to property transfer, the Air Force will conduct annual monitoring, provide annual reports and undertake prompt action to address activity that is inconsistent with the IC objectives or use restrictions, or any action that may interfere with the effectiveness of the ICs. The monitoring results will be included in a separate report or as a section of another environmental report, if appropriate, and provided to the U.S. EPA and DTSC. The annual monitoring reports will be used in preparation of the Five Year Review to evaluate the effectiveness of the remedy. Prior to transfer, the annual monitoring report submitted to the regulatory agencies by the Air Force will evaluate the status of the ICs and how any IC deficiencies or inconsistent uses have been addressed.

Upon the effective date of property conveyance, the transferee or subsequent property owner(s) will conduct annual physical inspections of each site to confirm continued compliance with all IC objectives unless and until the ICs at Sites 2, 5, and 19 and the SAR are terminated. The transferee or subsequent property owner(s) will provide to the Air Force, U.S. EPA, and DTSC an annual monitoring report on the status of ICs and how any IC deficiencies or inconsistent uses have been addressed. The Air Force will place these transferee obligations in the transfer documentation. The 5-year review reports conducted by the Air Force will also address whether the ICs in the ROD were inserted in the deed(s), if property was transferred during the period covered, whether the owners and State and local agencies were notified of the ICs affecting the property, and whether use of the property has conformed to such ICs. Five-year review reports will make recommendations on the continuation, modification, or elimination of annual reports and IC monitoring frequencies. Five-year review reports are submitted by the Air Force to the regulatory agencies for review and comment. Although the Air Force is transferring procedural responsibilities to the transferee and its successors by provisions to be included in the deed(s) transferring title to IRP Sites 2, 5, and 19 and the SAR and may contractually arrange for third parties to perform any and all of the actions associated with ICs, the Air Force is ultimately responsible for the remedy.

### **Response to Violations**

Prior to property transfer, the Air Force will notify EPA and DTSC as soon as practicable but no longer than 10 days after discovery of any activity that is inconsistent with the IC objectives or use restrictions, or any other action that may interfere with the effectiveness of the ICs. The Air Force will notify U.S. EPA and DTSC regarding how the Air Force has addressed or will address the breach within 10 days of sending U.S. EPA and DTSC notification of the breach. Post-transfer, if the transferee fails to satisfy its obligations pursuant to the SLUC, DTSC may enforce such obligations against the transferee. If there is failure of the selected remedy or a violation of selected remedy obligations (for example, an activity inconsistent with the IC objective or use restriction, or any action that may interfere with the effectiveness of the ICs), DTSC will notify the Air Force and U.S. EPA in writing of such failure as soon as practicable (but no longer than 14 days) upon discovery of the inconsistent activity or action that interferes with the effectiveness of the ICs, and initially seek corrective action or other recourse from the transferee. Within 21 days following DTSC's notification, the Parties shall confer to discuss reimplementation of the selected remedy or other necessary remedial actions to address the breach of any IC. Once DTSC reports that the transferee is unwilling or unable to undertake the remedial actions, the Air Force will within 10 days inform the other Parties of measures it will take to address the breach.

### **Approval of Land Use Modification**

Prior to transfer, the Air Force shall not modify or terminate land use controls, or implementation actions that are part of the selected remedy without approval by U.S. EPA and DTSC. The Air Force shall seek prior concurrence before any anticipated action that may disrupt the effectiveness of the land use control or any action that may alter or

negate the need for land use controls. Any grantee of property constrained by ICs imposed through their transfer document(s) may request modification or termination of the ICs. Modification or termination of these ICs, except the SLUC (discussed below), requires Air Force, U.S. EPA, and DTSC approval.

### **State Land Use Covenant (SLUC) Modification**

Any modification or termination of the SLUC must be undertaken in accordance with State law and will be the responsibility of the transferee or then-current owner or operator.

<sup>1</sup> or other entity accepting such obligations (which may include, without limitation, subsequent transferees)